IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.2628 OF 2006.

Santoshkumar Ram Achhaiber Misrha,
Aged about 31 years, Occ.: Service,
Indian Inhabitant of Mumbai, residing
at Room No.3 admeasuring about 15x30
sq.ft. situated at Bholanath Ramadhar
Pandey Chawl, Raman Wada, Near P.& T.
Colony Sahar Road, Vile Parle (East),
Mmbai 400 099. ... Appellant.

Versus.

Bombay Municipal Corporation of
Greater Bombay, A Corporate Body
incorporated under BMC Act 1888
having their head office at
Mahapalika Marg, CST, Mumbaiu 400 001. ... Respondent.

Shri R.C.Mishra i/by Shri M.P.Mishra for the Appellant.

Shri J.J.Xavier for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 29th January, 2007.

ORAL JUDGMENT.:

1. Admit. Shri Zavier waives service for the Respondent. Taken up for hearing forthwith. I have heard the learned Advocate for the Appellant, the learned Advocate for the Respondent and the learned Advocate for the Applicant in Civil Application No.477 of 2007.

2. The Appellant is the original Plaintiff. The

Appellant filed a suit for injunction restraining the Respondent-Corporation from demolishing the suit structure described in paragraph 1 of the plaint without following the due process of law. A Notice of Motion was taken out in the said suit for temporary injunction. It appears that the learned trial Judge appointed a Court Commissioner and the report of the Court Commissioner dated 5th September 2006 was taken on record by the trial Court on 13th September 2006. The report was taken on record when the Notice of Motion taken out by the Appellant was for consideration before the trial Court. On the basis of the report of the Commissioner, the learned trial Judge observed that the Appellant has not mentioned the correct area of the suit structure. The learned trial Judge referred to the notice issued by the Respondent and observed that the Appellant has suppressed that the suit structure was earlier demolished. On the ground of failure to mention the correct size of the suit structure and the alleged suppression of earlier demolition of the suit structure, the learned trial Judge dismissed the suit filed by the Appellant.

3. The learned Advocate for the Appellant pointed out that no opportunity was given by the learned trial Judge for filing objection to the report of the Commissioner. He submitted that on 5th September 2006,

the Applicant in Civil Application No.477 of 2007 applied for intervention and immediately on the next day the suit was dismissed though the stage of the suit was of consideration of notice of motion for temporary injunction. He submitted that the impugned order is illegal. The learned Advocate for the Respondent-Corporation supported the impugned Judgment and order. The learned Advocate appearing for the Appellant in Civil Application No.477 of 2007 supported the impugned order. She, however, submitted that in case this Court is inclined to remand the suit for consideration of the trial Court, the Appellant/Plaintiff be directed to implead the Applicant as a party Defendant.

4. I have considered the submissions. The impugned order dated 13th September 2006 itself discloses that on the very day the report of the Court Commissioner was taken on record and a copy of the Report was furnished in the Court to the parties. On the basis of what is observed in the Commissioner’s Report, the learned Judge observed that the size of the suit structure mentioned in the plaint was incorrect. The learned trial Judge has referred to some notice and has held that the notice discloses that the suit structure was earlier demolished and therefore, there is suppression of material facts on the part of the Appellant.

5. In my view a very strange approach was adopted by the learned trial Judge. If the report of the Court Commissioner was to be relied upon for throwing out the suit of the Appellant at interim stage, surely the learned trial Judge ought to have given a reasonable opportunity to the Appellant to file objections to the report of the Court Commissioner. The learned trial Judge completely ignored that the Plaintiff could have even applied for examining the Court Commissioner on oath as provided in sub-rule (3) of Rule 10 of Order XXVI of the Code of Civil Procedure, 1908. The learned trial Judge referred to some notice in which it is alleged that the suit structure was earlier demolished. If the suit was to be dismissed on account of suppression of material facts, it was necessary to establish that there was in fact a suppression of material facts and that what is stated in the notice was true and correct. It is not clear whether the contents of the notice were proved. At least there is no finding to that effect. The learned trial Judge has dismissed the suit hurriedly by completely ignoring the rules of fair play and natural justice. Therefore, the impugned Judgment and Order deserves to be quashed and set aside. The Notice of Motion for temporary injunction will have to be heard on merits after giving an opportunity to the parties to file objection to the report of the

Commissioner. To avoid unnecessary delay in disposal of the Notice of Motion and considering the facts and circumstances of the case, it is necessary for the Appellant to implead the Applicant in Civil Application No.477 of 2007 as a party Defendant to the suit.

6. Hence the following order is passed:

i) The impugned Judgment and order dated 13th September 2006 is quashed and set aside and L.C.Suit No.3487 of 2006 and the Notice of Motion taken out therein are restored to the file of the learned trial Judge.

ii) The parties are directed to appear before the learned trial Judge on 13th February 2007 at 11.00 a.m.. Within a period of one week from 13th February 2007, the Appellant will implead the Applicant in Civil Application No.477 of 2007 (M/s.Baluwala Builders) as a party Defendant No.2. The parties to the suit are permitted to file objections, if any, to the report of the Commissioner on or before 23rd February 2007.

iii) The learned trial Judge will dispose of the Notice of Motion as expeditiously as possible and preferably on or before 30th March 2007. Till disposal of the Notice of Motion, the parties will maintain status-quo as of today in all respects in respect of the suit structure.

iv) The learned trial Judge will decide the Notice of Motion and the suit on its own merits without being influenced by the limited ad-interim order passed by this Court.

v) The Appeal is partly allowed in the above terms with no order as to costs.

vi) The parties and the concerned Court to act on an authenticated copy of this order.

Judge.